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No. 04-433

In the Supreme Court of the United States

JOSEPH ANZA, ET AL.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Must a civil RICO claim based on mail or wire fraud allege reliance on the fraudulent misrepresentations or concealments?

2. If the answer to the first question is in the affirmative, must the plaintiff allege its own reliance, as opposed to reliance by a third party?

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy, and transacting business throughout the United States as well as in many countries around the world.

One of the Chamber's central functions is to represent its members' interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1]

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, there are those who may misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions. The Court of Appeals' holding in this case, that a plaintiff alleging injury "by reason of" fraudulent conduct need not prove its own reliance on such conduct, extends the RICO statute beyond its intended breadth. Reversing that decision would provide an important check against misuse of the civil RICO statute – a check that is consistent with Congress' evident purpose and with this Court's precedents – while allowing recovery by those the statute is designed to protect. Accordingly, the

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[1] Letters of consent from the parties have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* and its members made a monetary contribution to its preparation.

Chamber and its members have a strong interest in encouraging the Court to reverse the decision below.

STATEMENT OF THE CASE

This case involves a civil RICO claim brought by respondent, Ideal Steel Supply Corp. ("respondent" or "Ideal"), based on the federal mail and wire fraud statutes. Ideal purchases steel mill products from manufacturers and sells those products and related hardware to professional ironworkers, small steel fabricators and homeowners. Ideal's only substantial competitor is National Steel Supply, Inc. ("National"), owned by Joseph and Vincent Anza (collectively, "petitioners"). *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d 251, 254-55 (2d Cir. 2004).

Ideal alleged, among other things, that National and its owners engaged in a scheme in violation of the civil RICO statute, 18 U.S.C. § 1964(c). The alleged scheme involved failing to charge sales taxes to certain customers residing in New York State ("State"), then submitting false tax reports to the State by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. According to Ideal, National's "cash, no tax" sales, along with the fraudulent sales tax reports, were intended to, and did, injure Ideal's business. *Id.* at 255. Specifically, Ideal alleged that it lost profits because "its own list prices were, on average, no higher than those of National and that but for [National's] 'cash, no tax' scheme, National would have had no competitively significant price advantage over Ideal." *Id.*

Petitioners moved to dismiss on the ground that respondent did not, and cannot, satisfy the reliance element of a civil RICO claim based on mail or wire fraud. Petitioners argued that, consistent with RICO's proximate cause requirement, the reliance element required respondent to allege and prove its own reliance on the purported misrepresentations. In response, respondent argued that it satisfied the requisite pleading elements merely by alleging

third-party reliance on petitioners' alleged fraudulent misrepresentations and that these misrepresentations proximately caused harm to Ideal. The district court agreed with petitioners that a plaintiff must show that it actually relied on the alleged misrepresentations, and thus dismissed the complaint. *Ideal Steel Supply Corp.* v. *Anza*, 254 F. Supp. 2d 464, 468-69 (S.D.N.Y. 2003).

The U.S. Court of Appeals for the Second Circuit reversed. It held "that a RICO claim based on mail [or wire] fraud may be proven where the misrepresentations were relied on by a third person [here, the State], rather than by the plaintiff" so long as there is "a causal connection between the prohibited conduct and plaintiff's injury." *Ideal Steel Supply Corp.*, 373 F.3d at 262 (citation omitted). The Court of Appeals further held that respondent sufficiently alleged that it suffered lost profits that were proximately caused by a RICO violation. *Id.* at 263. The Court therefore held that respondent could bring suit for treble damages under RICO despite its failure to allege that it relied on the alleged misrepresentations at issue. *Id.*

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a plaintiff asserting a civil RICO violation based on mail or wire fraud need not allege or establish that the plaintiff was proximately caused by its own reliance on fraudulent behavior.

I. As a preliminary matter, this Court should resolve a fundamental circuit conflict as to whether a civil RICO claim based on mail or wire fraud requires proof of *any* reliance on the alleged fraudulent misrepresentations or concealments – *i.e.*, reliance by *someone* on the fraudulent behavior. Although RICO and the mail and wire fraud statutes do not use the term "reliance," that element of common-law fraud is necessarily incorporated into the statute under "the rule that Congress intends to incorporate the well-settled meaning of

the common-law terms it uses," including the term "fraud." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). By the time the civil RICO statute was enacted in 1970, reliance was a "well-settled" - indeed, a fundamental - element of a private civil action for fraud. It also was (and still is) a necessary element of the proximate cause showing that this Court has held is required in a civil RICO action. *See Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Consequently, the element of reliance is properly incorporated into civil RICO claims based on mail fraud or wire fraud.

The Court should also hold that this reliance element requires a specific showing of reliance *by the plaintiff* rather than a third party. This is how courts interpreted the reliance element of common-law fraud at the time RICO was enacted. Under the "common-law meaning rule," this settled understanding of fraud is presumed to have been incorporated into civil RICO claims based on mail or wire fraud absent statutory text or structure to the contrary. *See Neder*, 527 U.S. at 23 & n.7. There is no statutory text or structure in the RICO, mail fraud or wire fraud statutes to rebut this presumption.

II. Public policy also supports the recognition of a "plaintiff-reliance" element in civil RICO claims based on mail or wire fraud.

First, recognizing such an element would help limit civil RICO claims to direct victims of the alleged violations. This Court recognized in *Holmes* that, as a matter of policy, treble-damage recovery under RICO should be reserved for those who can show that they were *directly* injured by a violation. *Holmes*, 503 U.S. at 268. Plaintiffs who allege injury based on fraudulent behavior relied on by a third party necessarily allege an injury that flowed only indirectly (at best) from the fraud. As explained in *Holmes*, such claims for indirect injury should be barred, in part, because they create unduly

complicated inquiries about the impact of other causes and the proper apportionment of damages among multiple victims. *Id.* at 269.

Second, recognizing a plaintiff-reliance element would prevent plaintiffs from transforming ordinary business tort claims into complex RICO claims in an effort to obtain treble damages and attorney's fees. There is no basis to conclude that Congress contemplated such a result.

Third, recognizing a plaintiff-reliance element would prevent RICO from becoming a source of additional *qui tam*-type, private-attorney-general litigation. Here again, there is no basis to conclude that Congress intended to authorize the kind of claim at issue here, which amounts to a private attorney general suit based on the alleged submission of false documents to a governmental body.

Finally, recognizing a plaintiff-reliance element would deter many plaintiffs (or potential plaintiffs) who did not actually rely on alleged fraudulent behavior - and therefore have at best a weak case on causation - from filing a civil RICO claim based on fraud. And such an element would allow courts to weed out weak fraud-based RICO claims on motions to dismiss or for summary judgment.

ARGUMENT

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of racketeering activity, which is broadly defined to include more than 100 predicate acts. 18 U.S.C. § 1961(1). To recover treble damages under the civil RICO statute, a plaintiff must prove that he was "injured in his business or property *by reason of*" a violation of RICO's prohibitions against racketeering activity. 18 U.S.C. § 1964(c) (emphasis added). In *Holmes* v. *Securities Investor Protection Corporation*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in § 1964(c) to require a showing "that

the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268.

As *Holmes* explained, the concept of "proximate cause" is a "judicial tool[] used to limit a person's responsibility for the consequences of that person's own acts." *Id.* "Justice demands" such a limitation in this context because "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269 (citation omitted). Moreover, allowing plaintiffs to recover damages when they suffered only indirect harm "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.*

For these reasons, this Court held that a plaintiff cannot recover treble damages under RICO merely by showing that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Id.* at 265-66 (footnote omitted). Instead, the plaintiff must prove "some *direct* relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (emphasis added). As we now show, this proximate cause element requires a showing that the plaintiff himself relied upon the alleged fraud.

I. Under The "Common-Law Meaning" Rule, The RICO Statute Requires Proof Of Plaintiff-Reliance When A Civil RICO Claim Is Based On Mail Or Wire Fraud.

In the decision below, the Court of Appeals implied, but did not expressly hold, that the proximate cause element required by *Holmes* requires a showing of reliance by at least someone in the causal chain when a civil RICO claim is based

on mail or wire fraud. *See Ideal Steel Supply Corp.*, 373 F.3d at 262-64 (discussing State's reliance on alleged false tax reports). This is consistent with Second Circuit precedent holding that reliance is an element of such a claim. *See Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. granted in part*, 125 S. Ct. 2956 (Jun. 27, 2005), *cert. dismissed*, 126 S. Ct. 675 (Nov. 15, 2005). Indeed, respondent has conceded that "[t]he federal courts have generally held . . . reliance is required" to state a RICO claim when the alleged predicate act is mail or wire fraud. Br. In Opp'n to Pet. for Writ of Certiorari ("Opp'n"), No. 04-433, at 2 (filed Oct. 29, 2004).

Nevertheless, the circuits are divided on this issue. *See* Pet. for Writ of Certiorari ("Pet. "), No. 04-433, at 6 (filed Sept. 29, 2004).[2] Accordingly, in subsection A, we explain why the Court should resolve this conflict and hold, as a preliminary matter, that the proximate cause element articulated in *Holmes* requires the plaintiff in a civil RICO suit based on mail or wire fraud to show reliance on fraudulent behavior. *See Bank of China*, 359 F.3d at 176. In subpart B, we explain that this reliance element should be understood, consistent with common-law fraud, to require a showing of reliance by the plaintiff himself.

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[2] The Second, Sixth and Eleventh Circuits have held that reliance is an element of a civil RICO claim based on mail or wire fraud. *See Bank of China*, 359 F.3d at 178; *VanDenBroaeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Sikes* v. *Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002). The First Circuit has rejected this view. *See Sys. Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 103-04 & n.3 (1st Cir. 2002); *see also Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004) (recognizing circuit split on this issue). This conflict was to be addressed in the *Bank of China* case, but the petition for *certiorari* in that case was dismissed voluntarily by the parties.

A. The Civil RICO Statute Requires A Showing Of Reliance Whenever The Claim Is Based On Mail Or Wire Fraud.

Reliance is a necessary element of the proximate cause analysis in the civil RICO context when the claim is based on mail or wire fraud. This conclusion is compelled by the principle that Congress is presumed to incorporate the settled meanings of the common-law terms it uses.

1. This principle plainly applies when interpreting the mail and wire fraud statutes. That conclusion was established in *Neder* v. *United States*, 527 U.S. 1 (1999), which addressed whether the common-law fraud element of "materiality" should be read into the mail and wire fraud statutes. Neither statute uses the term "material," but this did not end the Court's analysis. Rather, the Court turned to the "well-established rule of construction that 'where Congress uses terms that have accumulated settled meaning under . . . the common law, a court *must* infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* at 21 (quotation and citations omitted) (emphasis added).

In applying this "well-established rule of construction," the Court emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "required a misrepresentation or concealment of *material* fact." *Id.* at 22; *see also id.* (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996)). In light of this common-law requirement, the Court found that it "must presume that Congress intended to incorporate materiality [into the mail and wire fraud statutes] 'unless the statute[s] otherwise dictate[.]'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

The Court further held that, once this presumption attaches, the party opposing it bears a heavy burden. *See id.* As the Court explained, any "rebuttal [to this presumption] can only come from the text or structure of the fraud statutes themselves." *Id.* at 23 n.7. Ultimately, the Court found that "materiality of falsehood is an element of the federal mail fraud [and] wire fraud . . . statutes" because the Government "failed to show that [the] language [of these statutes] is inconsistent with a materiality requirement." *Id.* at 25.[3]

2. This well-established rule of construction applies equally when interpreting the RICO statute. That conclusion flows from *Beck* v. *Prupis*, 529 U.S. 494 (2000), which turned to the "well-established common law of civil conspiracy" to "determine what it means to be 'injured . . . by reason of' a 'conspir[acy]'" in the civil RICO context. *Id.* at 500.[4]

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[3] As *Neder* pointed out, in criminal prosecutions brought directly under the mail and wire fraud statutes, the prosecutor needs to show only a "scheme to defraud" - not a "completed fraud," with resulting injury. *Neder*, 527 U.S. at 25. Accordingly, the Court found that Congress did not intend to incorporate the common-law fraud elements of reliance and damages into the requirements for criminal mail and wire fraud. Unlike a criminal mail or wire fraud prosecution, however, a civil RICO claim for treble damages based on mail or wire fraud *does* require a showing of injury to the plaintiff's business or property "by reasons of" - *i.e.*, proximately caused by - the predicate acts. 18 U.S.C. § 1964(c); *see also Holmes*, 503 U.S. at 268-69.

[4] *See also Pasquantino* v. *United States*, -- U.S. --, 125 S. Ct. 1766, 1774 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), the Court held that all of these "operative terms . . . carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has

Thus, under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" does not end the inquiry as to whether reliance is an element of a civil RICO claim based on fraudulent misrepresentations or concealments that violate the mail or wire fraud statutes. Indeed, the absence of the term "reliance" from the RICO statute is hardly surprising given that this element applies only to a subset of civil RICO claims, *i.e.*, those predicated on fraudulent misrepresentations or concealments. Accordingly, the Court must look to the common-law elements of fraud at the time the RICO statute was enacted in 1970 to determine whether a showing of reliance is required in a civil RICO claim based on mail or wire fraud.

3. By 1970, the common-law elements of fraud – including reliance – had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance.[5] Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of torts," but the common-law also required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964)

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defined them to include."); *Holmes*, 503 U.S. at 268-69 (relying on the common-law concept of proximate causation to construe the phrase "by reason of" in § 1964(c)).

[5] *See Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff and in reliance upon which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery.").

("LAW OF TORTS").[6] As the RESTATEMENT (FIRST) OF TORTS explained, the maker of a fraudulent misrepresentation would be liable only if the recipient relied on "the truth of the matter misrepresented" and the recipient's "reliance upon the misrepresentation [was] a substantial factor in determining the course of conduct which result[ed] in his loss." RESTATEMENT (FIRST) OF TORTS § 546 (1938).

When RICO was enacted, therefore, a jury was not left to devise its own definition of proximate cause in the context of common-law fraud. Rather, a jury was required to find that the plaintiff relied on the alleged fraudulent conduct and that such reliance was a substantial factor in causing – *i.e.*, a proximate cause of – the damages asserted. *Id.*

4. Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance in the RICO statute] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *id.* To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as conveying its satisfaction with the elements of common-law fraud. As this Court held in *Beck*, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial

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[6] *See also* LAW OF TORTS, at 729 ("The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course, and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.") (footnotes omitted); *Danann Realty Corp.* v. *Harris*, 5 N.Y.2d 317, 322 (1959).

mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*" 529 U.S. at 500-01 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)) (emphasis added).

In short, because both the mail and wire fraud statutes require a "fraud," and because "fraud" is defined at common law to require reliance on the alleged misrepresentation or concealment, the "common-law meaning" rule requires the Court to "presume that Congress intended to incorporate" the element of reliance into a civil RICO claim for damages based mail or wire fraud. *See Neder*, 527 U.S. at 23.

B. To Satisfy This Reliance Element, The Civil RICO Plaintiff Must Allege And Prove That It, Not Some Third Party, Relied On The Alleged Fraudulent Behavior.

As indicated above, respondent does not dispute that some showing of reliance is required in a civil RICO suit based on mail or wire fraud. Opp'n at 2. Instead, based on a single recent New York case, respondent argues that "[a] general requirement for reliance is of course broad enough to include third-party reliance." *Id.* at 5. Respondent is mistaken.

1. The "common-law meaning" rule also compels the conclusion that the civil RICO statute requires a specific showing of reliance by the plaintiff ("plaintiff-reliance"), and that a showing of mere third-party reliance is legally insufficient to state a civil RICO claim based on mail or wire fraud. As the RESTATEMENT (FIRST) OF TORTS makes clear, common law fraud required a showing that *the plaintiff*, as opposed to some third party, relied on the alleged misrepresentation in a business transaction:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by *his [i.e., the plaintiff's]* reliance upon the truth of the matter misrepresented if *his* justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

RESTATEMENT (FIRST) OF TORTS § 546 (1938) (emphasis added). Other common law treatises from the time the civil RICO statute was enacted in 1970 similarly refute respondent's theory that a plaintiff need only show third-party reliance to recover on a fraud claim. *See, e.g.*, LAW OF TORTS, at 729 ("The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, take in cases of misrepresentation the form of inducement of *the plaintiff* to act, or to refrain from acting, to his detriment.") (emphasis added); *see also id.* ("The false representation must have played a material and substantial part in leading *the plaintiff* to adopt his particular course.") (emphasis added).

New York common law as of 1970 confirmed that "the traditional elements" of fraud required a showing of plaintiff-reliance. For example, in *Escoett & Co.* v. *Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929 (N.Y. App. Div. 1969), the appellate division ordered a fraud count dismissed because the counterclaimant did "not claim that it was deceived or induced into acting to its detriment, in reliance upon representations made by the [counterclaim defendant]." *Id.* at 929. Rather, "[t]he representations of which the [counterclaimant] complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it." *Id.*; *see also Ryan Ready Mixed Concrete Corp.* v. *Coons*, 267 N.Y.S.2d 627, 629 (N.Y. App. Div.

1966).[7] Other states adopted a similar interpretation of common-law fraud at this time.[8]

Accordingly, under the common-law meaning rule, Congress is presumed to have intended to incorporate the element of plaintiff-reliance into civil RICO claims based on fraudulent misrepresentations or concealments, such as those proscribed by the mail and wire fraud statutes. *See Neder*, 527 U.S. at 23. Neither "the text [n]or structure of the fraud [and RICO] statutes themselves" can support respondent's effort to rebut this presumption and carve out an exception to the plaintiff-reliance element for certain claims by a competitor. *Id.* at 23 n.7.

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[7] Respondent asserts that New York law is to the contrary and, in support, cites *Ruffing* v. *Union Carbide Corp.*, 764 N.Y.S.2d 462, 465 (N.Y. App. Div. 2003). *See* Opp'n at 5 n.1. This assertion is misplaced. Neither *Ruffing* (decided in 2003) nor any of the cases on which it relied was decided contemporaneously with the civil RICO statute. Therefore, Congress certainly did not intend to incorporate such precedent as part of RICO. *See Neder*, 527 U.S. at 22 (looking to state of law at time of statutes' enactments to discern common-law meaning of statutory terms).

[8] *See, e.g., Schock* v. *Jacka*, 460 P.2d 185, 188 (Ariz. 1969) ("requiring reliance [on the fraud] by plaintiff to his damage"); *Piedmont Trust Bank* v. *Aetna Cas. & Sur. Co.*, 171 S.E.2d 264, 267 (Va. 1969) (holding that "one who seeks to hold another in fraud must clearly show that he relied upon the acts and statements of the other"); *First Credit Corp.* v. *Behrend*, 172 N.W.2d 668, 671-72 (Wisc. 1969) ("[I]n any fraud case, in order to secure relief, the complaining party must honestly confide in the representations or, as has been said, must reasonably believe them to be true."); *State Farm Mut. Auto. Ins. Co.* v. *Wall*, 92 N.J. Super. 92, 97-98 (1966) (holding that plaintiff must show "reliance upon the truth of the representations . . . to warrant recovery of damages in an action for fraud and deceit.").

2. Finally, respondent can find no support for its position in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), which was cited by the Court of Appeals. In *Sedima*, this Court merely held that a civil RICO plaintiff is not limited to redress of a "racketeering injury" but, rather, may recover damages caused by the predicate acts themselves. *Id.* at 495-97. Quoting the dissent in that case, the Court of Appeals cited *Sedima* for the unremarkable proposition that the civil RICO statute was designed to benefit a defendant's competitors "who could '*plead and prove* that they suffered . . . injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity.'" *Ideal Steel Supply Corp.*, 373 F.3d at 260 (quoting *Sedima*, 473 U.S. at 519-20) (Marshall, J., dissenting)) (emphasis added). Putting aside the fact that this quotation is lifted from the dissent, the statement is not inconsistent with a requirement of plaintiff-reliance.

Moreover, the majority in *Sedima* clearly held that competitors who choose to sue under RICO must plead and prove damages that "flow from the commission of the predicate acts." *Sedima*, 473 U.S. at 497. This holding is entirely consistent with petitioners' view that, when the RICO predicate acts are mail or wire fraud, the competitor must plead and prove, consistent with the common-law fraud elements, that it actually relied on the alleged fraudulent misrepresentations or concealments. *Sedima* thus adds nothing to this inquiry.

II. Public Policy Dictates That Civil RICO Claims Based On Mail Or Wire Fraud Satisfy The Element Of Plaintiff-Reliance.

Public policy considerations also strongly favor petitioners' position that civil RICO claims based on mail or wire fraud require a showing of plaintiff-reliance.

A. Adopting The Common-Law Element Of Plaintiff-Reliance Would Help Curb "Massive And Complex Damages Litigation" By Plaintiffs Harmed Only Indirectly By A RICO Violation.

Such a rule is necessary, for example, to ensure that only those *directly* harmed by RICO violations are able to recover under the statute. In *Holmes*, this Court pointed to a serious "fear," grounded in public policy, that "[a]llowing [civil RICO] suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Assoc. Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 545 (1983)); *see also Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (noting that three dissenting members of Congress "feared the treble-damages provision would be used for malicious harassment of business competitors"). In particular, this Court found that allowing indirectly injured plaintiffs to sue under RICO would force courts to grapple unnecessarily with two problems: (1) difficulties in "ascertain[ing] the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"; and (2) complications in "apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269

(citation omitted). Both of these problems are presented in this case.

First, respondent's allegations, and similar claims, raise complex questions about the amount of damages "attributable to the violation." *Holmes*, 503 U.S. at 269. Respondent alleges that it lost customers, and thus profits, because petitioners did not charge these customers sales tax and submitted false tax reports to the State. *Ideal Steel Supply Corp.*, 373 F.3d at 254-55. But the mere submission of false tax reports to the State, and the State's reliance on those reports, obviously did not itself cause any customer to choose one competitor over the other. Rather, the alleged harm is based on speculation that, but for the alleged fraud, customers themselves would have chosen to purchase steel products from respondent instead of from petitioners. *Id.* at 255.

As predicted in *Holmes*, it would be very difficult to ascertain the amount of respondent's (or a similarly-situated plaintiff's) lost profits attributable to the alleged RICO violation as opposed to ordinary and independent business factors. *Holmes*, 503 U.S. at 269. Customers may have chosen petitioners' products over respondent's products for reasons wholly independent of the alleged "cash, no tax" practice. For example, these customers may have preferred petitioners' service, the location of petitioners' business, or the products offered by petitioners. In fact, some of these customers may not even have been aware that they were not being charged sales tax. And respondent's sales may have waned because of poor marketing or other business decisions unrelated to the alleged fraud.

The *Holmes* Court suggested that such "massive and complex damages litigation" issues be eliminated from RICO litigation by incorporating a strict proximate cause requirement into all RICO claims. *Holmes*, 503 U.S. at 274.

This Court should reaffirm that policy by expressly incorporating the common-law element of plaintiff-reliance into civil RICO claims based on mail or wire fraud.

Second, respondent's allegations, and similar claims, create a serious risk of "multiple recoveries." *Holmes*, 503 U.S. at 269. Any recovery by respondent here would not prevent the direct victim (here, the State) from seeking additional relief, thus resulting in the potential for multiple, non-overlapping recoveries. Specifically, the State arguably could pursue its own RICO claim against petitioners even if petitioner were ordered to pay respondent treble damages in this lawsuit. Such a result could subject petitioners to not one, but two, treble damages awards. *Cf. Carter* v. *Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (noting that RICO allows for "allows for treble, not sextuple damages").

Moreover, under respondent's interpretation of the civil RICO statute, if National Steel had five competitors instead of only one, there would be six viable civil RICO lawsuits (including a potential action by the State). There is no reason to believe that Congress intended RICO to authorize such multiple recoveries. To the contrary, this is the precise kind of situation that the Court hoped to avoid in *Holmes*. *See Holmes*, 503 U.S. at 269.

As *Holmes* recognized, the litigation difficulties that would arise if indirectly injured plaintiffs were allowed to sue under RICO are not counterbalanced by any legitimate public policy benefits. As the Court explained there, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70.

In short, requiring a plaintiff to show that it and not some third party actually relied upon the alleged fraud will further the sound public policy of avoiding undue burdens on the courts while maintaining "the effectiveness of treble-damages suits.'" *Id.* at 274.

B. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent Plaintiffs From Transforming Ordinary Business Tort And Contract Claims Into Complex RICO Claims.

Adopting respondent's interpretation of the civil RICO statute would also vastly multiply the number of RICO claims alleged in ordinary business litigation. Under respondent's broad interpretation of RICO, many ordinary business claims - such as claims for unfair competition, antitrust violations, Lanham Act violations, product liability, misappropriation of trade secrets and accountant liability, to name just a few - also would support a civil RICO claim based on mail or wire fraud so long as a third party relied on the alleged fraudulent behavior and there is some arguable nexus between that behavior and the alleged damages. Such a reading of RICO, if adopted by this Court, would expand the pool of potential RICO plaintiffs and lawsuits, overcomplicate business litigation, and significantly expand the business community's potential liabilities under the statute.

Lower federal courts have already recognized these problems and have sought to preempt them. For example, the Seventh Circuit has held that a civil RICO claim based on mail fraud "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250,

1258 (7th Cir. 1995). Similarly, the Sixth Circuit has held that civil RICO claims should not be broadly construed to supplant other civil claims: "Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim [based on fraud] absent evidence that the defendant made representations to the victim." *Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993).

These holdings make sense as a matter of policy because they help prevent plaintiffs from transforming routine business litigation into complex RICO actions.

C. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent RICO From Becoming A General-Purpose Private Attorney General Statute.

The potential for increased RICO litigation is especially apparent in this case, in which the respondent is essentially bringing a private attorney general suit based on the alleged submissions of false documents to the State. Absent a plaintiff-reliance requirement, virtually anyone who believes he has been indirectly injured by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct. And that possibility would likely transform RICO into a general-purpose private attorney general or *qui tam*-type statute.

There is no evidence, however, that Congress intended RICO to be read so broadly as to authorize actions similar to those authorized under the False Claims Act. In contrast to RICO, the False Claims Act *expressly* provides that private individuals are permitted, under certain circumstances, to bring actions against persons who have made false or fraudulent claims for payment to the United States. *See* 31 U.S.C. §§ 3729-30. No provision of the civil RICO statute

authorizes such a cause of action, nor should such a provision be read into RICO.

Requiring a plaintiff to show that it rather than a third party actually relied upon the alleged fraud will prevent RICO from becoming a general-purpose private attorney general statute by which private plaintiffs can sue businesses based upon alleged frauds directed at governmental bodies. Such a requirement ensures that such claims, if asserted at all, are asserted by the injured governmental body.

D. Adopting The Common-Law Element Of Plaintiff-Reliance Would Discourage The Filing Of, And Facilitate The Dismissals Of, Frivolous Civil RICO Claims.

Finally, requiring a showing of plaintiff-reliance in civil RICO suits based on mail or wire fraud would serve to curb frivolous civil RICO suits. Such a requirement would "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 861 (2005).

The current state of RICO litigation demands such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 521 (2002). Since 1986, for example, nearly 1,000 civil RICO cases have been filed per year. *See* Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 2.03 at 2-41 (2005). As Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by

plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989).

Civil RICO claims based on mail or wire fraud are particularly subject to abuse given that "[t]he vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense." Susan Getzendanner, *Judicial "Pruning" Of "Garden Variety Fraud" Civil Rico Cases Does Not Work: It's Time For Congress To Act*, 43 VAND. L. REV. 673, 678 (1990). Indeed, Chief Justice Rehnquist went so far as to question "[w]hether it is a good idea to have a civil counterpart for wire fraud and mail fraud" at all, given that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud - which applies to all telephone calls - have a much wider sweep now than they did when the statutes were enacted." Rehnquist, 21 ST. MARY'S L.J. at 10.

These policy concerns militate strongly in favor of incorporating a plaintiff-reliance element into civil RICO claims based on mail or wire fraud. For one thing, a plaintiff-reliance requirement will reduce the number of plaintiffs who can assert RICO claims consistent with good-faith pleading requirements. Moreover, if a plaintiff files a civil RICO claim based on mail or wire fraud without having actually relied upon a fraudulent misrepresentation or concealment, the plaintiff-reliance requirement puts the court in a better position to dismiss, or grant summary judgment on, that claim once it becomes apparent that no reliance actually occurred.[9] In both of these ways, a plaintiff-reliance

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[9] *Compare Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming summary judgment in favor of the defendant,

requirement reduces the number of meritless civil RICO claims draining judicial resources from more pressing priorities, and creating needless litigation costs for businesses around the country.

* * * * *

In sum, respondent's attempt to have the Court abolish the common-law element of plaintiff-reliance in civil RICO suits based on mail or wire fraud runs headlong into the "common-law meaning" rule of statutory interpretation. It would also have disastrous consequences. The Court of Appeals erred in adopting respondent's arguments and thereby construing the civil RICO statute well beyond its intended breadth.

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in part, because the plaintiff had not "produced a shred of evidence" that the plaintiff "relied on any statement or omission to its detriment"); *Fla. Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1279 (S.D. Fla. 2004) ("Summary judgment is also entered in DuPont's favor on Plaintiff-Growers' RICO claims, Counts VI and VII. The undisputed record shows that Plaintiff-Growers cannot prove reasonable reliance or direct injury."); *Lifschultz Fast Freight, Inc.* v. *Consol. Freightways Corp.*, 805 F. Supp. 1277, 1292 (D.S.C. 1992) (granting summary judgment in favor of the defendant because the plaintiff "presented no evidence" of detrimental reliance), *aff'd without op.* 998 F.2d 1009 (4th Cir. 1993); *with Feely* v. *Whitman Corp.*, 65 F. Supp. 2d 164, 174 (S.D.N.Y. 1999) (denying summary judgment to the defendants because "the common law requirement of justifiable reliance is not an element of wire or mail fraud under federal law").

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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JOSEPH ANZA, VINCENT ANZA, and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization whose member law firms litigate antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, schemes to defraud, and white-collar criminal activity. In civil actions, NASCAT's members not only secure compensation for victims, but also deter wrongdoers, modify corporate behavior, and improve access by victims to justice. NASCAT's members advocate the enactment and enforcement of state and federal laws to prevent wrongful, fraudulent, and manipulative business practices. NASCAT's members are particularly interested in civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, as its members represent the victims in civil RICO actions.

II. INTRODUCTION

This case concerns the proximate cause necessary to be pled in a civil RICO case based upon violations of the federal mail and wire fraud statutes. The opinion by the

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[1] Pursuant to Rule 37 of the Rules of this Court, counsel for Amicus Curiae hereby certify that the consent of all of the parties has been obtained to the filing of this Brief. In accordance with Rule 37(6), counsel for NASCAT represent that they authored this Brief and that no counsel for either party authored this Brief, in whole or in part. No other party made a monetary contribution to the preparation or submission of this Brief.

United States Court of Appeals for the Second Circuit framed the issue in the following holding:

> The principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

Ideal Steel Supply Corp. v. Anza, et al., 373 F.2d 251, 263 (2nd Cir. 2004). The Circuit found that:

> [T]he principal intended victim of the scheme was *Ideal*, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that *Ideal*, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of 18 U.S.C. §1962(c) based on the alleged predicate acts of mail and wire fraud.

This Court has granted review to resolve an apparent split between the Circuit Courts of Appeals on this issue. This Brief by Amicus Curiae NASCAT seeks succinctly to demonstrate that RICO is a broad statute, offering civil relief to intended victims injured "by reason of" a RICO violation as determined under the principles announced in

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), whether or not the underlying fraudulent communications were relied upon by the injured victims.

III. SUMMARY OF ARGUMENT

Petitioners would have this Court limit "scheme to defraud" in the federal mail and wire fraud statutes,[2] by requiring a "convergence"[3] between the victim to whom a perpetrator makes a misrepresentation and the victim from whom property is obtained and require reliance as a *per se* requirement for proximate cause under RICO. Their arguments threaten to preclude *all* "third-party" frauds under the mail and fraud statutes – civil *and* criminal – and sharply to curtail the class of victims who may seek appropriate relief under civil RICO, rolling back well-established current law.

The convergence rule that Petitioners propose, which finds no support in the text of the federal fraud statutes or RICO, little or no support in the common law, and no support in sound legal policy, finds only contradictory support in decisions of three circuits,[4] while the decisions

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[2] 18 U.S.C. §§ 1341, 1343. Decisions under the two statutes treat key issues identically. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

[3] The term "convergence" is sometimes used in the decisions; it is only a shorthand way of referring here to limiting "scheme to defraud" to face-to-face transactions involving perpetrators and victims where the victims rely to their detriment upon misrepresentations. *United States v. Christopher*, 142 F.3d 46, 52-53 (1st Cir. 1998), notes the issues, the use of the term, and the conflicts between the circuits.

[4] *See, e.g., Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989) (citing *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1988) ("from the

(Continued on following page)

of five[5] circuits flatly reject it. Petitioners' *per se* reliance requirement for proximate cause under RICO is unintelligible, because misrepresentation or omission under "scheme to defraud" is not required under the mail and

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victim of the deceit")); *Johnson Enterprises of Jacksonville, Ind. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998); *accord, Monterey Plaza Hotel Ltd. Partnership v. Local 483, Hotel & Restaurant Employees Union*, 215 F.3d 923, 926 (9th Cir. 2002) (RICO predicated on extortion and mail fraud dismissed under *Lew*); *contra, Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (RICO complaint upheld for injury of lost customers inflicted by competitor's fraud on third parties); *John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D.Va. 1987) (disappointed bidder sued winning bidder who obtained a contract by fraud; common law claims dismissed, because the Government, not the plaintiff relied on the misrepresentations, but RICO claims upheld, because RICO proximate cause not identical to common law proximate cause), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987).

[5] *See, e.g., United States v. Christopher*, 142 F.3d 46, 52-53 (1st Cir. 1998); *Environmental Tectonics v. W. S. Kirkpatrick, Inc., Dev. Int'l Corp., et al.*, 847 F.2d 1052, 1055 (3rd Cir. 1988), *aff'd on other grnds*, 493 U.S. 400 (1990); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir. 1983); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993); *accord, Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002) (decisions from other circuits on convergence rejected; defendant lost a reliance argument, but won a pattern argument under RICO) ("Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way. . . ."); *Atlas Pile Driving Co. and Olson Concrete Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989) (RICO fraud theory upheld, because it is broader than common law fraud); *contra, Israel Travel Advisory Servs., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (Easterbrook, J.) (mail fraud; competitor may not complain of lost customers); *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) (Easterbrook, J.) ("only a scheme to obtain money or other property from the victim by fraud violates § 1341"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) ("to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts.")

wire fraud statutes themselves. Nor is its analogue required for injury to be found to be caused to intended victims or competitors "by reason of" other predicate offenses under RICO (*e.g.*, murder, arson, extortion, bribery, etc.). Petitioners confuse what may be sometimes *sufficient* for what is always *necessary*. Reliance (or its absence) may in some situations establish (or not establish) the proximate cause nexus between a violation of RICO and the injury to the victim's business or property, but it is plainly not necessary in *every* situation, as the facts of this appeal amply establish and numerous lower court decisions unequivocally illustrate.

IV. ARGUMENT

A. RICO

In 1970, Congress enacted RICO, modeled on the antitrust statutes, to deal with "enterprise criminality." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted). As in the antitrust statutes, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (antitrust). Thus, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. 229 at 248-49 (1988). "The occasion for Congress' action was the perceived need to combat

organized crime. But Congress for cogent reasons chose to enact a more general statute." *Id.* at 248.

B. The Civil Remedy and Private Enforcement

As in the antitrust statutes, RICO creates "a private enforcement mechanism that ... deter[s] violators[;] deprives them of the fruits of their illegal actions[;] and ... provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (antitrust) (citing *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313-14 (1978)); *accord*, *Rotella v. Wood*, 528 U.S. 549 at 558 (2000) ("'private attorneys general' dedicated to eliminating racketeering activity. ... The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering.") Congress not only created civil and criminal remedies, it deliberately instructed that the courts were not to limit the reach of RICO. Indeed, RICO makes its principle of liberal construction a matter of *express* statutory language to achieve its remedial purposes. P.L. No. 91-452, 84 Stat. 923, 947 (1970); *see also PacifiCare Health Systems, Inc. v. Brook*, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. ... [W]e stated that 'both RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees'. ... [We have also taken] note of the 'remedial function' of RICO's treble damages provision.") (emphasis in original; citations omitted). "RICO is to be read broadly." *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1984); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 (1982) (antitrust). This court has

recognized this principle repeatedly, rejecting all attempts to limit RICO by constricted readings of its provisions.

In line with Congress' explicit purpose, the causation element is simply stated. Civil RICO authorizes persons "injured" in their "business or property" *"by reason of"* RICO's "violation" to sue for appropriate redress, including equity relief and treble damages and attorneys fees. 18 U.S.C. § 1964(a)(c). A "violation" of RICO is committed if a "person," defined to include "individuals and entities," *id.* § 1961(3), under appropriate circumstances, uses the mails or wires, in the course of "any scheme to defraud." 18 U.S.C. §§ 1341, 1343, 1961(1)(B), 1962. Thus, RICO expressly envisions, as here, individual *and* corporate criminal *and* civil responsibility for "schemes to defraud." *Sedima*, 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). RICO affords to victims appropriate civil redress.

C. *Holmes* and Proximate Cause

Following RICO's antitrust parentage, in *Holmes*, this Court read "by reason of" in § 1964(c) to embody traditional notions of "proximate cause" on the issue of relative remoteness. 503 U.S. at 265-69 (citing *Associated General Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters*, 459 U.S. 519, 535 (1983) (antitrust) (AGC)). *Holmes* applied modified antitrust remoteness factors to RICO; the modification occurred because RICO does not have an "antitrust injury" analogue. *Holmes*, 503 U.S. at 259 n.15.

The Court reformulated the five *AGC* antitrust factors into a three-factor standard to fit RICO: the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims, the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among [claimants] . . . removed at different levels of injury . . . to obviate the risk of multiple recoveries," and the absence of a "need to grapple with the problems" because more immediate "victims . . . [could] be counted on to vindicate the law as private attorneys general. . . ." *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 540-42).

Holmes did not announce a "black letter" rule that would "dictate the result in every case," but reformulated the 19th century "remoteness" rule of the common law (that turned on an analytical analysis of "direct or indirect" injury, that is, a formal "rule") into a 20th century "standard." *See* 503 U.S. at 274 n.20 ("Thus, our use of . . . 'direct' should . . . be understood as a reference to the proximate-cause enquiry . . . informed by the . . . [three factors] set out in the text. We do not necessarily use it in the same sense as courts before us have . . . ") (emphasis added). The distinction between a "rule" (drive 55 mph) and a "standard" (drive reasonably) is brought out by Professor Sunstein in *Legal Reasoning and Political Conflicts,* 106-08, 110-15, 130-35 (1993). Roscoe Pound in *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482-83, 485-86 (1933) gives the classic formulation of the distinction.

"Labels," which substitute for reasons, merely tagging outcomes, without giving the true criteria for decision, that is, "direct or indirect", were no longer to obtain to

determine "remoteness." This Court in *AGC* specifically rejected the labels of "target" and "zone of interests," because the use of "labels [as a technique of making decisions] may lead to contradictory and inconsistent results." 459 U.S. at 537 n.33. *See also Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 586 (1937) (Cardozo, J.) ("labels . . . are subject to the dangers that lurk in metaphors . . . and must be watched . . . lest they put us off our guard"); *Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920) (Cardozo, J.) ("To determine whether . . . [a treaty] has . . . [a] character it is not enough to consider its . . . label. No general formula suffices. We must consult in each case the . . . purpose of the specific articles [of the treaty] involved.").

In this case the court below applied *Holmes* properly. To be sure, the Second Circuit below used "target" language in its analysis, but it used it *solely* to sum up a conclusion that it reached independent of labels, applying the *Holmes* factors.

Because "scheme to defraud" encompasses more than face-to-face transactions or misrepresentations or omissions, as noted in more detail below, a *per se* "convergence" rule and a universal requirement of reliance for proximate cause ought to be rejected by this Court. The only legally acceptable way to determine the issue of remoteness is to use the *Holmes* factors, as the Second Circuit did below, and to assess the proximate cause nexus case-by-case, using the normal tools of proximate cause. Reliance is surely *sufficient* in some cases, but it is hardly universally *necessary*, as Petitioners would have it. The element of reliance was, in fact, *not* essential to its decision; "proximate cause" was necessary and found by the Circuit. "Proximate cause" may be found in a variety of ways in a

variety of situations. *See, e.g., Basic, Inc. v. Levinson*, 479 U.S. 1083 (1987) ("There is . . . more than one way to demonstrate . . . [a] causal connection."). Far from departing from *Holmes*, the Second Circuit followed the teachings of *Holmes* and the path of a majority of the circuit courts.

D. Scheme to Defraud

"Scheme to defraud" is *not* universally limited to misrepresentation or omission fraud; it extends, for example, to a fraud worked through bribery that need not involve misrepresentations. For the leading decision on the point, *see Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("A scheme to get money unfairly by obtaining and the betraying the confidence of another, or by corrupting one who acted for another . . . would be a scheme to defraud though no lies were told."), *overruled on other grounds*, *United States v. Cruz*, 478 F.2d 408, 412 n.8 (5th Cir. 1973) (court may not review the sufficiency of the evidence in a grand jury in light of *Costello v. United States*, 350 U.S. 359 (1956)); *see, e.g., United States v. Caldwell*, 544 F.2d 691, 695 (4th Cir. 1976) (mail fraud prosecution upheld that resulted from a scheme to use bank funds to bribe state officials).

"Scheme to defraud" may involve a third-party fraud, where the fraud (*e.g.*, a misrepresentation or a bribe) victimizes one entity, say, a rate-setting commission that may or may not itself suffer a property loss, where a loss is then suffered by a third person, say, a rate-payer; a gain inures to the perpetrator, say, a utility, a result that is intended. The loss and the gain need not be identical; they need only be related; and no "convergence" is required

between the principal victim (the rate-setting commission) and the secondary victims (the rate-payers) of the fraud. This model is from *Holmes* itself, in which this Court *recognized* that a third-party fraud victim might properly establish proximate cause under the Court's remoteness teachings, 503 U.S. at 279 n.19, an aspect of *Holmes* not discussed by Petitioners.

Here, a "convergence" requirement (a misrepresentation to the victim who suffers the loss) would preclude recovery. Instead, a showing of "proximate cause" suffices and a victim can establish it by the use of this Court's general "proximate cause" standards. Third-party frauds, as here, typically involve a fraud on a governmental entity, *see, e.g., Bieter*, 987 F.2d at 1325 n.4 (bribery; zoning board); *Environmental Tectonics*, 847 F.2d at 1055 (bribery; foreign government), where it is not necessary to make misrepresentations or an omission, and "convergence" is not present, yet a violation of mail or wire fraud is committed, and RICO authorizes recovery. Accordingly, Petitioners' arguments would undermine a central purpose of RICO: control of public "corruption". *Statement of Findings and Purpose*, P.L. No. 91-452, 84 Stat. 922-23 (1970).

Under this Court's well-settled jurisprudence, "scheme to defraud" is broad, and it extends "to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). It "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter*, 484 U.S. at 27 (citations omitted). But this Court squarely teaches, and Petitioners ignore, that "scheme to defraud" *extends* beyond frauds accomplished by misrepresentations or omissions, *Grin v. Shine*, 187 U.S. 181, 189 (1902) (embezzlement), and it reaches, for example,

beyond face-to-face transactions and includes third-party frauds, *United States v. O'Hagan*, 521 U.S. 642, 649-58 (1997) (misappropriation and use of confidential information to trade on securities); *accord*, *Carpenter*, 484 U.S. at 25-29 (insider trading viewed as misappropriation).

E. The Common Law and Federal "Fraud"

Petitioners urge this Court to follow the common law, but then grossly mischaracterize it. The roots of the Petitioners' errors lie in their confusing various kinds of "fraud," a term, as Dean Prosser so ably teaches, that is "so vague that it requires definition in nearly every case." *William Prosser et al., Law of Torts*, 727 (5th ed. 1984) ("Prosser"). Petitioners erroneously equate and conflate "scheme to defraud" under federal law with common law "obtaining money by false pretenses," a crime, and common law "deceit," a tort, each of which contain misrepresentation and reliance elements with common law "cheat," a crime that required an "intent to defraud" and a false symbol or token but neither misrepresentation nor "convergence" face-to-face transactions, and "conspiracy to defraud," a crime. Decisions and treatises of the time referred to the common law action for misrepresentation, not as "fraud," but "deceit." *See, e.g., Joel Bishop, Commentaries On The Non-Contract Law*, 132-44 (1889); *Frederick Pollock, A Treatise On The Law Of Torts*, 348-88 (1894). When "fraud" alone was used, it signified a much broader range of overreaching conduct. *See, e.g., Melville Bigelow, The Law of Fraud*, 3-4 (1877); *William Anderson, A Dictionary Of Law*, 474-78 (1889).

In fact, "scheme to defraud" in federal fraud law stems from a careful statutory blend of common law "cheat" and "conspiracy to defraud."

> [M]ail fraud is the culmination of a long historical progression. Seen in the light of . . . history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token . . . [M]ail fraud does not require such a token. . . . The requirements of common law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of 'scheme.' The drafters also retained the element of 'intent to defraud' required by false pretenses. . . . Accordingly, mail fraud is best seen as a modern form of common-law cheating.

Note: Whatever Happened to Durland?: Mail Fraud, RICO, and Justifiable Reliance, 68 Notre Dame L. Rev. 333, 337-64 (1992).

Cheating, without misrepresentation, omission, "convergence," or a face-to-face transaction, now suffices under mail or wire fraud to establish a "scheme to defraud." *See, e.g., Murr Plumbing v. Scherer Bros. Fin. Serv. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO mail fraud); *Formax, Inc. v. Allan C. Hostert, et al.*, 841 F.2d 388, 390 (Fed. Cir. 1988) (RICO mail fraud). The mail and wire fraud "scheme" is not limited to the common law's "false pretenses" and "deceit". "Scheme to defraud" includes, in sharp contrast, making promises with an intent not to perform, *United States v. Comyns*, 248 U.S. 349, 353

(1919), and embezzlement, *Grin v. Shine*, 187 U.S. at 189. *See generally Rollin M. Perkins et al., Criminal Law*, 292-342, 351-388 (3rd ed. 1982); *Clark & Marshall, Law of Crimes* 706-780, 795-840 (6th ed. 1958) (*Melvin F. Wingersky ed.*). Mail and wire fraud forbid schemes that involve false representations and schemes to defraud that do not. *United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991). Petitioners offer no valid justification to overrule this settled body of law that has worked well to vindicate the right of victims of "schemes to defraud."[6]

F. Construing the Statutes

The traditional elements of "scheme to defraud," well-established by this Court's jurisprudence, may be simply set out. The defendant must act with "intent to defraud." *Durland v. United States*, 161 U.S. 306, 312-14 (1896). Good faith is an absolute defense. *Id.* The perpetrator must formulate a "scheme." "A scheme refers to the overall design to defraud one or many by means of a common plan

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[6] First enacted in 1872, the mail fraud statute is the progenitor of the federal fraud statutes codified in Title 18 in 1948. Congress, in fact, added wire fraud, modeled on mail fraud, as a separate crime in 1952. The phrase now appears in up to 500 federal statutes as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Testimony of Acting Assistant Attorney General John C. Keeney). Thus, "scheme to defraud" is a crucial concept in federal fraud law, criminally and civilly. Moreover, "[these statutes] have been regularly enforced by executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric." *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("During the past century, both Congress and [this] . . . Court have repeatedly placed their stamp of approval on expansive use of the mail and wire fraud statutes.").

or technique." *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir. 1995).

"Scheme to defraud" is "sufficiently general" to reach a broad range of illicit activity. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974) (mail fraud's "scheme to defraud" applicable to a credit card scam, even though credit cards were not in existence in 1872, when it was drafted). The perpetrator must intend the result of his or her scheme, that is, he or she must intend to deprive another of something of value, or to gain a benefit for himself or herself by means of deprivation or gain. *Carpenter*, 484 U.S. at 27. "Intent . . . make[s] an otherwise innocent act criminal, if it is a step in a plot." *Badders v. United States*, 240 U.S. 391, 394 (1916) (mail fraud) (Holmes, J.). Apart from the jurisdictional elements (mail, interstate wire, etc.), "scheme to defraud" requires nothing else. A "scheme to defraud" may be implemented through a variety of techniques, including, but not limited to, misrepresentations. A comprehensive definition of "scheme to defraud" "need not be undertaken," *Fasulo*, 272 U.S. at 628, and it has not been. The classic decision declining to offer such a definition of "fraud" is *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941) (Holmes, J.) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.").

Petitioners' arguments are inconsistent with the text of the fraud statutes and modern conceptions of "fraud." Reading RICO, or any other statute, including the federal fraud statutes, is basically a question of the "language of the statute – the most reliable evidence of its intent." *United States v. Turkette*, 452 U.S. 576, 493 (1981); *see Henry Friendly, Benchmarks*, 202 (1976) ("(1) read the statute, (2) read the statute, (3) read the statute") (quoting

the three rules of Justice Frankfurter for interpreting statutes); *see also Felix Frankfurter, Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); *Roscoe Pound, III Jurisprudence*, 488-90 (1959), "specious construction [of statutes] tends to bring law in to disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order." *G. Robert Blakey & Kevin Roddy, Reflections on Reves v. Ernest & Young*, 33 Am. Crim. L Rev. 1345, 1460 n.441 (1996), summarizes the basic principles followed by this Court in construing RICO; they run straight and true. So, too, do the Court's later decisions, *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Pro., Ltd. v. Don King*, 533 U.S. 158 (2001); *PacifiCare Health Systems, Inc. v. Brook*, 538 U.S. 401 (2003). Petitioners offer no convincing reason to abandon these sound principles now.

The statutes (18 U.S.C. §§1341, 1343) here say "any" fraud. "Any" means "all" not "some, but not others." *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 212, 223 (1991). No convincing policy justification can be, or has been, offered to support inserting into these fraud statutes an extra-statutory-based requirement of "convergence" of the perpetrator and his or her victim, particularly in a society that is unfortunately characterized by complex, multiple-party frauds.

Petitioners' arguments are an unwise effort to return to the discredited philosophy of *caveat emptor*, where

courts externalized the costs of fraud from entrepreneurs to hapless victims in an effort to conserve scarce capital in a developing economy in the early 19th century. *See generally, Morton J. Horwitz, The Transformation of American Law: 1780-1860*, 253-66 (1977) (tracing the rise of "legal formalism," which weighted the law differently to narrow damage claims, to a "political and economic power shift . . . to merchant and entrepreneurial groups"). RICO squarely stands in the tradition of congressional legislation that rejects the philosophy of *caveat emptor*. *See, e.g., SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963) (securities statutes designed to curtail "philosophy of caveat emptor"); [*Max Radin, The Lawful Pursuit of Gain*, 54 (1931)] ("[C]aveat Emptor . . . is bad Latin, and from the Roman point of view, worse law."). That day is over. Petitioners' "convergence" rule is without a justifiable textual, common law, or statutory basis to support it.

Fundamentally, the Petitioners misunderstand *Holmes*. Factual ("but for") cause is, of course, insufficient. 503 U.S. at 265. In each instance, an examination of other considerations is required to determine the proper extent of liability. *Id.* at 266. But no "black letter rule . . . will dictate the result in every case." *Id.* at 274 n.20 (citing *AGC*, 459 U.S. at 536). "Schemes to defraud" may, of course, involve simple, face-to-face misrepresentation or omission fraud. Even so, "proximate cause" may require an analysis not only of the transaction (how did you get into the relationship?), but also of loss causation (why did you suffer the loss?). *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (1990) (RICO; while transaction and loss causation may merge, each must be shown; fraud that induces entry into oil and gas partnership establishes transaction causation, but where the fraud is unrelated to

the decline in market value, loss causation is not established) ("If the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy."). Thus, proof of "convergence" and reliance may or may not show transaction and loss causation. Compare *Metromedia Co. v. William D. Fugazy, et al.*, 983 F.2d 350, 368 (2nd Cir. 1992) (RICO; reliance in face-to-face misrepresentation fraud shows proximate cause between fraud and injury) *with Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996) (RICO; where plaintiff knew of overcharges, no proximate cause between face-to-face misrepresentation fraud and injury).

Antitrust causation is also instructive in construing RICO's causation provision. When this Court, in *AGC*, took up "proximate cause" in antitrust litigation, it specifically criticized and rejected the use of "labels" to decide remoteness questions. 459 U.S. at 528-35 & n.33 ("directness," "zone of interests," and "target"). Instead, the lower courts were to "analyze each situation in light of the factors" that the Court identified in its opinion. *Id.* In fact, RICO and antitrust overlap. *See, e.g., Environmental Tectonics*, 847 F.2d at 1067 (antitrust and RICO recovery upheld in bribery by bidder of foreign government). "Proximate cause," apart from special antitrust requirements, is the same under RICO and antitrust. *Holmes*, 503 U.S. at 269-70. Yet third-party recovery *without* "convergence" or "reliance" routinely meets the test of proximate cause in antitrust litigation. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988) (manufacturer of plastic conduit properly permitted to sue under the antitrust statutes manufacturer of steel

conduit that improperly influenced a trade association, which, in turn, promulgated a safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others). Thus, Petitioners' *per se* approach for "convergence" and "reliance" is unsupportable in light of the text of RICO and its antitrust parentage.

G. Reliance Alone

Petitioners confuse "sufficient" with "necessary." Respondent has shown a *sufficient* connection between Petitioners' violations of RICO and Respondent's injuries using traditional proximate cause tools *without* having to show reliance. In fact and in law, Respondent's competitive injuries to its business and property followed, as sunrise follows sunset, when Petitioners *intentionally* made the illegal and anti-competitive sales in the confined Bronx market, *knowing* and *intending* the consequence that their illegal and anti-competitive sales would have on the business and property of the Respondent as part of their "scheme to defraud," not merely the taxing authorities, but, most importantly, Respondent. Respondent ought to be able to try to convince a jury under the facts well-pled and amply shown on this record of the proximate relation under RICO between the illegal and anti-competitive sales of Petitioners and the sales lost by Respondent.

An argument for reliance as the *sole* means to show proximate cause under RICO would not be made before this Court, or seriously entertained if made, had Petitioners burned down Respondent's store or shot its president. Remoteness would, of course, not be an issue, but why

should "reliance" either be raised? *See Jerry Kubecka, Inc., v. Avellino*, 898 F. Supp. 963, 969 (E.D. N.Y. 1995) (corporation, but not personal estates, permitted to sue under civil RICO for economic injury to its business and property flowing from a mob hit on its president by hitmen connected to rival garbage collection companies; reliance neither raised nor considered).

H. Remoteness and RICO

Remoteness is another matter, an issue of weighing factors in choosing between victims to select the one in the "best position" to enforce *federal law, not state* law. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-45; *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990) (antitrust); *California v. ARC America Corp.*, 490 U.S. 93, 102 n.6 (1989) ("ARC") (antitrust); *see Sports Racing Serv., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 n.15 (10th Cir. 1997) (antitrust) ("best position to identify . . . [a violation] and the most incentive to bring an action"). No plaintiff's claim should be, as here argued by Petitioners, denied under a "remoteness" analysis when the denial is "likely to leave a significant violation [of federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Petitioners complain vociferously about the overlap between RICO and state law. Nevertheless, "undetected and unremedied" is an issue of *federal* law. *See ARC*, 490 U.S. at 104-05 (antitrust; duplication under federal and state law permissible); *Turkette*, 452 U.S. at 587 n.9; P.L. No. 91-452, 84 Stat. 923, 947 (1970) (duplication under RICO and state law preserved). Members of Congress raised similar questions in the floor debates on RICO. *Turkette*, 452 U.S. at 586-87 ("In the face of these objections, Congress

nonetheless proceeded to enact the measure."). Petitioners must take their complaints to Congress, not this Court.

I. Competitive Injury

No one else can sue for Respondent's *competitive* loses under RICO but Respondent. *See Sedima*, 473 U.S. at 497 & n.15 ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts. Such damages include, but are not limited to, . . . competitive injury. . . .)." The majority and minority in *Sedima* were *unanimous* on the recovery of competitive injuries. Petitioners would have this Court turn its back on this aspect of *Sedima*. Indeed, they do not mention this aspect of *Sedima* in their arguments, as if this Court were not already aware of the *stare decisis* force of a unanimous precedent. In short, no suit by New York's taxing authorities can seek to encompass *these* losses *under* RICO. As the Second Circuit held: "*Ideal*, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims" 373 F.3d at 264.

J. Intentional Torts

Traditionally, foreseeability plays a diminished role in "proximate cause" determinations where the "tort" is, as here, intentional. *See, e.g., Restatement of Torts (Second)*, § 435, an aspect of the Restatements not mentioned by Petitioners. RICO is a "tort," *Mid Atlantic Telecom, Inc.*, 18 F.3d at 263-64, and its predicate offenses require a state of mind, met here by a showing of "intentional" conduct under circumstances where the perpetrator is virtually certain of the anti-competitive consequences of his unlawful behavior under RICO. Thus, the chain of causation for

cognizable damages under RICO properly extends further than merely negligent torts. *See, e.g., Roma Construction Co. v. Arusso*, 96 F.3d 566, 576 (1st Cir. 1996) (RICO; succumbing to Governmental extortion by victim does not break in chain of causation), *reversing*, 906 F. Supp. 78 (D.R.I. 1995) (holding that a person who pays an extortionist is the cause of his own injury). Here, the tort is both intentional and targeted at Petitioners' competitor. The Restatement does not counsel against standing.

K. *Peek* and the Petitioners

The Petitioners' *per se* preclusion of the recovery for injury suffered by a third party whose injury was an objective of the scheme, where the fraud is in part directed at another party, particularly a government agency, is a misguided effort to import a discredited 19th century *laissez faire* limitation in English law on civil "deceit" into the modern American law of "scheme to defraud." Petitioner's argument implicitly adopts the wholly discredited common law limitation imposed at the height of English *laissez faire* in *Peek v. Gurney*, L.R., 6 Eng. & In. App. 377 (1873). Lord Cairns, reflecting the narrow views of his day, held that a speaker who makes a misrepresentation is civilly liable only to the one whom he "desired" to influence (the principal listener) by the representation in the fashion that occasioned the injury; absent extraordinary circumstances, third parties were not to recover. *Peek* is criticized in *W. Page Keeton, The Ambit of Responsibility for Fraud: Representator's Liability*, 17 *Tex. L. Rev.* 1 (1938) and *Prosser* at 743-45.

A *Peek*-type limitation from English law for federal mail or wire fraud or civil RICO, is unsupported both by the language of the mail or wire fraud provisions and RICO (that affords "any person," 18 U.S.C. § 1961(3), the right to sue. *Id.* at 1964(a)), or by any justifiable grounds of public policy in a modern society. Limitations on civil "deceit" "plainly have no place" in establishing a "violation" of a "scheme to defraud." *Neder v. United States*, 527 U.S. 1, 23 (1999). Nor should they affect civil liability. *American Society of Mechanical Engineers, Inc.*, 456 U.S. at 568-69 (antitrust) ("Victorian" common law limitations inappropriate on private enforcement of antitrust statutes.).

Early American common law decisions abound that are inconsistent with *Peek*. *See, e.g.*, *Ernest F. Bohannon v. Wachovia Bk. & Trust Co.*, 210 N.C. 679, 683, 188 S.E. 390, 394 (1936) (testator deceived into disinheriting plaintiff; plaintiff has claim for relief against perpetrator); *accord Restatement of Torts (Second)*, § 774B (1979); *Mitchell v. Langley*, 143 Ga. 827, 831, 85 S.E. 1050, 1051 (1915) (holder of life insurance policy defrauded into switching beneficiary; beneficiary has claim for relief against perpetrator). Sutherland in *J.G. Sutherland, Law of Damages* at 55 (1916) (citing *Ira Gregory v. John Brooks*, 35 Conn. 437 (1868)) observed, based on his review of the American common law cases, that "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . *unless the wrongful conduct is willful for that purpose.*" Petitioners refer to Sutherland's treatise, but do not mention the "willfulness" exception to the general remoteness rule at the American common law. History does not support the Petitioners' arguments.

L. The Floodgates Myth

Petitioners trot out the tired, old, and thoroughly refuted "opening the litigation floodgates" nightmare. It does not stand the light of day. Data, singularly missing from Petitioners' brief, refute their dire claims. Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, private plaintiffs instituted 84 percent. *United States Department of Justice, Sourcebook of Criminal Justice Statistics* 431 (1981). No one seriously suggests that civil antitrust litigation is at floodgate proportions. The number of criminal to civil RICO suits is now running at roughly the same ratio as the statutes that served as its model. *G. Robert Blakey & Thomas Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is this the End of RICO,"* 43 *Vanderbilt L. Rev.* 851, 1020 (1990) (150 against 1000). Recent data indicates that criminal filings in 2005 were 69,818, of which 29 (.0004% of the total) were criminal RICO, Table D-2, *Federal Judicial Caseload Statistic* (March 31, 2005), while civil filings in 2005 were 278,712, of which 840 (.000003.5% of the total) were civil RICO, Table C-2, *id.* http://www.uscourts.gov/caseload2005/contents.htm (last visited 2-5-06). Blakey and Perry generally refute the litigation floodgate myth at 869-73.

More recent data confirms their analysis. In fact, since 1989, the date of this Court's *H. J. Inc.* "pattern" decision, the number of civil RICO filings steadily *declined*. From 1980-1996, for example, the number of civil cases filed in federal courts *increased* from 168,800 to 272,700 per year (*U.S. Census Bureau, Statistical Abstract of the United States*) (Table No. 346) (1997) at 216, but the total number of civil RICO filings *decreased* from 903 each

year to 840 from 1993 to 1997. *Id.*, Table C-2A, *Judicial Business of the United States Courts* (1997).

RICO claims for relief no longer routinely appear in commercial litigation; sophisticated litigators now use them only in systemic patterns of unlawful conduct. Where others attempt to use them improperly, a substantial minority of the filings, they are quickly dismissed. At one time, the business community shunned civil RICO, feeling that to use it would legitimate a litigation technique that in the early days of its implementation was widely claimed to be illegitimate. That day is no more. *See, e.g., Edmund L. Andres, None Prove So Stubborn as a Giant Spurned*, N.Y. Times, June 11, 1997, at C37 (reporting a Volkswagen settlement of a civil RICO case brought by General Motors against it); *Saul Hansell, Bankers Trust Settles Suit With P. & G.*, May 10, 1996, at C1 (reporting a settlement of a civil RICO suit between two major corporations over an investment fraud). Nor may a court, in any event, properly use a fear of "excessive" litigation to curtail congressional express claims for relief.

M. RICO's Role

RICO is not ambiguous, as some argue; it is broad, as Congress designed it. *Sedima*, 473 U.S. at 499 (RICO "demonstrate[s not] ambiguity[, but] breadth") (citation omitted); *Russello v. United States*, 464 U.S. 16, 21-22 (1983) ("Congress selected ... ['interest'] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are 'enterprise' ... ; 'racketeering activity'; and 'participate'."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust) ("We must take a statute as we find

it. Congress created the treble damage remedy . . . precisely for the purpose of encouraging *private* . . . [litigation.] These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the . . . [law] and deterring violations.") (emphasis in original). Floodgates fears, even if valid, "are policy consideration more properly addressed to Congress than this Court." *Id.* at 345. But apart from the raw numbers, determining the volume of cases is pointless until the litigation is itself characterized, for, as this Court recognizes, "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

RICO's effectiveness, criminally and civilly, as a guarantor of the integrity of the nation's marketplace, an issue sadly in the headlines every day in the context of corporate fraud, is crucial. The litany of major company names facing fraud charges in the news is dizzying. *See, e.g., The Economist*, June 28, 2003 (Special Edition) at 7 (Enron, WorldCom, Tyco, Adelphia, HealthSouth, ImClone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed."). "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." *Carl Kaysen et al., Antitrust Policy*, 17 (1959); *accord, American Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or market power"). Antitrust focuses on the third; federal "scheme to defraud" statutes focus on the second; RICO focuses on the first and second. Together, they seek

a national marketplace characterized by integrity, both fiscal and physical.

If mail fraud, wire fraud, and RICO are to be limited, as boldly attempted here by Petitioners, that unwise reform ought, if at all, to come from a fully informed Congress. *H.J. Inc.*, 492 U.S. at 249. Congress still sits; it can amend RICO if it sees fit. *See, e.g., Private Securities Litigation Reform Act of 1995*, P.L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) (conduct actionable as securities fraud may not be grounds for civil recovery under RICO).

After ample time, and in full possession of the facts, Congress has not enacted *general* limitations on mail or wire fraud or on RICO's civil enforcement of their "scheme to defraud" provisions. Indeed, Congress expanded them after this Court's restrictive decision in *McNally v. United States*, 483 U.S. 350 (1987), *set aside in* 18 U.S.C. § 1346 ("honest services" fraud restored to mail and wire fraud statutes). Absent constitutional considerations which are absent here, that ought to end the matter judicially. *Turkette*, 452 U.S. at 587 ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt v. Hughes*, *supra*, 229 N.Y. 222, at 228-29. Amicus Curiae seeks no more than the enforcement of the statutes as written.

V. CONCLUSION

For these reasons, Amicus Curiae respectfully urges this Court to reject the arguments of Petitioners and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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